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Garden Bay Sdn Bhd v Sime Darby Property Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(C)(A)-2268–12 OF 2016
HAMID SULTAN, HASNAH HASHIM AND HARMINDAR SINGH JJCA
22 DECEMBER 2017

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Arbitration — Award — Setting aside — Demand for sums for works done — Counterclaim for delay in completing works — Arbitration award — Award on issues not presented — Whether arbitral award ought to be set aside — Whether arbitrator acted beyond jurisdiction — Whether there was breach of rules of natural justice — Whether award enforceable — Arbitration Act 2005 ss 37 & 42

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The respondent appointed the appellant as a contractor for a project ('the project') for a lump sum of RM846,175.50. Disputes and differences arose between the parties and these were then referred to the arbitration. The appellant was the claimant at the arbitration and it claimed for the sum of RM338,666.39 being the balance remaining unpaid for works done, interests and costs. The respondent, as the respondent in the arbitration, counterclaimed for the sum of RM246,978 together with general damages for the appellant's delay in completing the project. The arbitrator awarded, inter alia, that the respondent pays the appellant the sum of RM282,512 with interests and costs. On the respondent's counterclaim, the arbitrator held that the appellant was liable to pay the respondent liquidated ascertained damages and went on to order costs of rectification of defects. The respondent filed an originating summons ('OS') at the High Court under s 37 and alternatively under s 42 of the Arbitration Act 2005 ('the AA') to set aside the whole of the arbitration award made partly in favour of the appellant where the claim was concerned and partly in the respondent's favour where the rectification work was concerned. On the other hand, the appellant filed an OS for the recognition of the arbitration award made pursuant to s 38 of the AA. Both the respondent's and the appellant's OS were heard together. The High Court allowed the respondent's application. Hence the present appeal. The issues that arose were: (a) whether the High Court can set aside the whole arbitration award when part of the same was allowed by mutual consent of the parties; and (b) whether there was a breach of natural justice when the arbitrator decided that by conduct, the parties have accepted that the respondent's claim for rectification works was the sum retained as retention sum under the contract.

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Held, allowing the appeal:

(1) In the presence of s 37(6) of the AA, the courts option to set aside the award was limited, more so when the award could be saved by reference under s 37(6). In addition, s 37(1) itself says 'may' and 'only if' and further s 37(1)(a) asserts the applicant must provided proof to rely on the said grounds. Thus, restricting as well as cautioning the courts not to interfere with arbitral awards of arbitrator where parties themselves have chosen to be bound by their decisions. The trial court needs to appreciate the importance of the scheme which was within the framework of party autonomy concept (see paras 28–29).

(2) A meticulous compliance of the jurisprudence by parties as well as trial courts will save costs and time for the taxpayers as well as apex courts to avoid reading lengthy judgments on why the award should/should not be set aside. Any parties who make an application under s 37 or s 42 of the AA without seeking appropriate direction pursuant s 37(6) must be seen to be an abuse of process of the court and must be dismissed in limine unless the exception applies. The respondent had not made out a case before the judge to set aside the award under s 37 of the AA. The order of the High Court was set aside and the application for the enforcement of the award was allowed (see paras 31–33).

[Bahasa Malaysia summary

Responden telah melantik perayu sebagai kontraktor bagi sebuah projek ('projek') bagi jumlah sebanyak RM846,175.50. Pertikaian dan ketidaksefahaman timbul antara pihak-pihak dan hal ini dirujuk pada timbang tara. Perayu adalah pihak yang menuntut dalam timbang tara dan ia menuntut jumlah RM338,666.39 iaitu jumlah baki yang belum berbayar bagi kerja-kerja yang dijalankan, faedah dan kos. Responden, sebagai responden dalam timbang tara tersebut, menuntut balas jumlah RM246,978 bersama-sama dengan ganti rugi bagi kelewatan perayu dalam menyempurnakan projek tersebut. Penimbang tara mengawardkan, antara lain, agar responden membayar kepada perayu jumlah RM282,512 dengan faedah dan kos. Bagi tuntutan balas responden pula, penimbang tara memutuskan bahawa perayu bertanggungan membayar kepada responden ganti rugi likuidasi yang dikenal pasti dan seterusnya memerintahkan kos pembaikan kerosakan. Responden memfailkan saman pemula ('SP') di Mahkamah Tinggi di bawah s 37 dan alternatifnya s 42 Akta Timbang Tara 2005 ('ATT') untuk mengenepikan kesemua award timbang tara yang sebahagiannya dibuat berpihak pada perayu di mana tuntutan adalah berkenaan dan sebahagian lagi berpihak pada responden di mada kerja-kerja pembaikan adalah berkenaan. Sebaliknya, perayu memfailkan SP bagi mengiktiraf award timbang tara yang dibuat di bawah s 37 ATT. Kedua-dua SP responden dan perayu didengar bersama. Mahkamah Tinggi membenarkan permohonan responden. Oleh itu rayuan ini. Isu-isu yang timbul adalah: (a) sama ada Mahkamah Tinggi boleh mengetepikan kesemua award timbang tara sedangkan sebahagiannya

dibenarkan dengan kebenaran bersama pihak-pihak; dan (b) sama ada terdapat pelanggaran keadilan asasi apabila penimbang tara memutuskan, melalui tindakan, bahawa pihak-pihak telah bersetuju bahawa tuntutan responden bagi kerja-kerja pembaikan adalah jumlah yang ditahan sebagai jumlah yang tertahan di bawah kontrak.

Diputuskan, membenarkan rayuan:

(1) Dengan kewujudan s 37(6) ATT, pilihan mahkamah untuk mengenepikan award adalah terhad, khususnya apabila award ini boleh diselamatkan dengan rujukan pada s 37(6). Tambahan lagi, s 37(1) sendiri menyatakan 'may' dan 'only if' dan seterusnya s 37(1)(a) menyatakan pemohon mestilah memperuntukkan bukti untuk bergantung pada hujahan-hujahan tersebut. Ini menyekat dan memberi peringatan pada mahkamah-mahkamah untuk tidak campur tangan dalam award timbang tara penimbang tara apabila pihak-pihak sendiri memilih untuk terikat dengan keputusan mereka. Mahkamah bicara perlu mempertimbangkan kepentingan skima ini yang terdapat dalam rangka kerja konsep pihak autonomi (lihat perenggan 28–29).

(2) Pematuhan teliti pada jurisprudens pihak-pihak dan juga mahkamah bicara akan menjimatkan kos dan masa pembayar cukai dan juga mahkamah-mahkamah atasan daripada membaca penghakiman yang panjang tentang kenapa award patut/tidak patut diketepikan. Mana-mana pihak yang membuat permohonan di bawah s 37 atau s 42 ATT tanpa memohon arahan yang sepatutnya di bawah s 37(6) mestilah dilihat sebagai salah guna proses mahkamah dan ditolak in limine melainkan pengecualian terpakai. Responden gagal membuktikan kesnya di hadapan hakim untuk mengetepikan award di bawah s 37 ATT. Perintah Mahkamah Tinggi diketepikan dan permohonan penguatkuasaan award dibenarkan (lihat perenggan 31–33).]

Notes

For cases on setting aside, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2021–2107.

Cases referred to

Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd and another appeal [2017] MLJU 1530, CA (refd)

Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd [2007] MLJU 893; [2008] 3 CLJ 791, CA (refd)

Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481, CA (refd)

Hodgkinson v Fernie and Another (1857) 140 ER 712 (refd)

Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor and another appeal [2017] MLJU 1542, CA (refd)

Las Vegas Hilton Corporation v Lo Yuk Leung [1998] HKCU 33 (refd)
Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd [2007] 4 MLJ 113; [2007] 3 CLJ 185, CA (refd)
Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd [2016] 2 MLJ 697; [2016] 3 CLJ 403, CA (refd)
Rajasthan State Mines & Minerals v Eastern Engineering Enterprises [1999] (9) SCC 283, SC (refd)
Ram Pratap Chamaria v Durga Prosad Chamaria AIR 1925 PC 293 (refd)

Legislation referred to

Arbitration Act 1952 (repealed by Arbitration Act 2005)
Arbitration Act 1996 [UK] s 69
Arbitration Act 2005 ss 36, 37, 37(1), (1)(a), (1)(a)(iv), (1)(a)(v), (1)(b)(i), (1)(b)(ii), (3), (6), 42, 42(3), (4)(c)

Appeal from: Originating Summons No WA-24C(ARB)-22–08 of 2016 (High Court, Kuala Lumpur)

Colin Victor George (James Edwin Pushparatnam with him) (James Edwin & Co) for the appellant.
Raymond Mah (Prisilla Chong with him) (MahWengKwai & Assoc) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/the claimant in the arbitration proceedings appeals against the decision of the learned High Court judge for allowing the respondent's applications under ss 37 and 42 of the Arbitration Act 2005 ('the AA 2005'). In the instant case, the entire arbitration award was set aside under s 37. Sections 37 and 42 of the AA 2005 read as follows:

37 Application for setting aside

(1) An award may be set aside by the High Court only if —

(a) the party making the application provides proof that —

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the High Court finds that —

(i) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where —

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred —

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

(4) An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or, if a request has been made under section 35, from the date on which that request had been disposed of by the arbitral tribunal.

(5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(6) On an application under subsection (1) the High Court may, where appropriate and so requested by a party, adjourn the proceedings for such period of time as it may determine in order to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(7) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into the High Court or otherwise secured pending the determination of the application.

42 Reference on questions of law

(1) Any party may refer to the High Court any question of law arising out of an award.

(1A) The High Court shall dismiss a reference made under subsection (1) unless the

question of law substantially affects the rights of one or more of the parties.

(2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.

(3) The High Court may order the arbitral tribunal to state the reasons for its award where the award —

(a) does not contain the arbitral tribunal's reasons; or

(b) does not set out the arbitral tribunal's reasons in sufficient detail.

(4) The High Court may, on the determination of a reference —

(a) confirm the award;

(b) vary the award;

(c) remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration; or

(d) set aside the award, in whole or in part.

(5) Where the award is varied by the High Court, the variation shall have effect as part of the arbitral tribunal's award.

(6) Where the award is remitted in whole or in part for reconsideration, the arbitral tribunal shall make a fresh award in respect of the matters remitted within ninety days of the date of the order for remission or such other period as the High Court may direct.

(7) Where the High Court makes an order under subsection (3), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from that order.

(8) On a reference under subsection (1) the High Court may —

(a) order the applicant to provide security for costs; or

(b) order that any money payable under the award shall be brought into the High Court or otherwise secured pending the determination of the reference.

[2] The matter was fixed for hearing on 30 August 2017 and we asked the parties to submit further submissions on the scope of s 37 relating to the word 'contemplation' and 'may and if'. We reserved judgment.

[3] The appellant in the submission has highlighted to us that there were two orders made in relation to the award of the arbitrator in two sets of application under ss 37 and 42. The first set of application was only partly heard and the files were closed. The second set of application was filed on the instruction of the registrar. The factual matrix of what transpired in the High Court is unique

and we will deal with it further in our judgment.

[4] It is important to note in this case, the appellant asserts that the respondent should not have made an application under s 37(1)(a)(iv), (b)(i), (b)(ii) of the AA 2005 at all as the complaint before the learned judge is related to part of the award only. The appellant says that this can be further justified by the fact that there is a consent order in respect of the first set of application by a previous judge referring the matter to the arbitrator to state the grounds in relation to the counterclaim pursuant to s 42 of the AA 2005 only and not s 37.

[5] The respondent here was also the respondent in the arbitration proceedings. The respondent had a counterclaim. The facts will show that the respondent was only unhappy with issues related to the counterclaim in particular rectification works. There was no issue on the plaintiff's claim. By setting aside the award which relates to both the claim as well as the counterclaim, we take the view that there was grave error of law which has resulted in miscarriage of justice.

[6] Brief facts:

(a) The appellant was the contractor for the respondent for works based on lump sum of RM846,175.50 and to be completed within 12 weeks from date of site possession.

(b) Before the arbitrator, the appellant says he agreed to accept the final contract sum less payment made by the respondent. The arbitration award, in respect of the claimant less the counterclaim for rectification work, inter alia, read as follows:

> 4.39 The Claimant's Claim
>
> (a) the sum of RM338,666.39, the balance of the Claimant's claim remaining unpaid;
>
> The Claimant confirmed that the amount due was as stated in the Final Account prepared by the Respondent and as stated in the Statement of Final Account signed by the S.O. and the Respondent representative, the Final Account amount is RM846,175.50 and the Respondent has paid the Claimant todate RM502.509.11.
>
> In accordance with the considerations above, the Final Account prepared by the Respondent and Clause 54 (e) of the Conditions of contract the Arbitrator finds the following:
>
> Original Contract Sum 846,175.50
> Variation on Contract
> – Omission for Remeasurement Works 5,000.00

Final Contract Sum	841,175.50
Less 502,509.11 as confirmed by Parties in written submission as to the amount paid to the Claimant to date	– 502,509.11
Final Certificate Amount due to the Claimant	338,666.39
Less LAD as per Para 4.27	– 35,000.00
Less Cost for rectification of defects 2 1/2% of Contract Sum	– 21,154.39
Final Amount due to the Contractor as at 23 October 2013	RM282,512.00

(c) In respect of the respondent's defence and counterclaim, the arbitrator did not give grounds for deciding the amount of RM21,154.39 awarded for rectification work. That part of the award by the arbitrator which was the subject matter of challenge before the High Court and, inter alia, read as follows:

4.40 The Respondent's Defence and Counterclaim

The Defendant Counterclaim as follows:

(i) the Respondent owes the sum of RM36,688.39 to the Claimant –

Considering all the facts and circumstances available to the Arbitrator for this arbitration, I find and hold the Final Amount due to the Claimant as at 23 October 2013 is RM282,512.00.

(ii) in the alternative:

(a) that the Claimant pays the sum of RM246,978.00 together with general damages for the Claimant's delay in completing the landscape works to be assessed by the Arbitrator;

(b) that the total amount for the award as in the above paragraph (a) shall be set-off against the balance unpaid value of works of RM338,666.39.

Interest on sum awarded in the paragraphs above (a) and (b) at the rate of 5% per annum from the date of the Re-Amended Counterclaim until the date of the Award; and

(c) thereon the same rate from the date of Award until date of full settlement;

Considering all the facts and circumstances available to the Arbitrator for this arbitration, I find and hold the Claimant is liable to pay LAD of RM35,000.00 to be set off from the Final Certificate Amount of RM338,666.39 due to the Claimant.

As to costs for rectification work not completed as at 26 December 2012, I find and hold that the amount of Claimant's liability is 2 1/2% of Contract Sum amounting to RM21,154.39 as per para 2.35, to be set off from the Final Certificate Amount of RM338,666.39 due to the Claimant.

(d) The respondent filed ss 37 and 42 application in Suit No 24C (Arb)-13–03 of 2017 (first set of application). In that case the respondent had consented to refer the matter to the arbitrator under s 42(3), thereby directly or indirectly conceding that the grievance rest with the counterclaim only. That part of the consent terms, inter alia reads as follows:

> 1. Given the proper findings that:
>
> (a) the photographic record as at 6 April 2014 produced by the Claimant in Bundle C2 indicates similar status of defects of cracked hardscape surfaces and worn grass courts as at 7 January 2013 recorded by Pembinaan Muzqi Sdn Bhd (PMSB), Para 2.40;
>
> (b) as per Para 2.46 and 2.47 comparison of photographs taken on 7 January 2013 and 6 April 2014 indicates that defects in the hardscape as documented by the S.O. in Para 2 18 were still present as at 6 April 2014;
>
> (c) there is no evidence of an issuance of a Certificate of Making Good Defects;
>
> (d) the Claimant has to be liable for rectification works under its scope as instructed by the S.O.;
>
> the arbitral tribunal is ordered pursuant to subsection 42(3) of the Arbitration Act 2005 to state in sufficient detail, within 45 days from the date of the service of the Order or such other period as the parties may agree, the reasons for the finding that the Claimant is liable for RM21,154.39 as costs of rectification of defects when the Respondent's claim for rectification of defects by PMSB is at RM246,978.00.

(e) Based on the consent terms, the learned arbitrator delivered a supplementary arbitration award giving grounds for the counterclaim but still sustaining the amount awarded as RM21,154.39. In doing so, the learned arbitrator, inter alia, concluded that:

> The Claimant is liable for rectification works under its scope as instructed by the SO. By conduct, both Parties had accepted Retention Sum as a mode to allocate funds for rectification work as per the normal practice in construction contracts.
>
> As per F/A Para 2.35, the Respondent had retained RM21,154.39 as Retention Sum under Employer's Payment Advice dated 29 March 2012 as the cost of the Claimant's liability for outstanding rectification of defects.

(f) Parties went for case management in relation to the first set of application after the supplementary award was received. The court informed them that the file had been closed and invited parties to make fresh application. The respondent filed fresh application under s 37 as well as s 42. One technical problem in the fresh application is that the respondent would have been out of time to pursue the s 37 application and the consent order for referral was only for s 42 application. We will not labour on this point as there was no

submission on this issue before us.

(g) The respondent filed a fresh application under ss 37 and 42 and the appellant filed application for the enforcement of the award. The learned judge dismissed the enforcement application and allowed the setting aside application under s 37.

[7] The learned counsel for the respondent has set out the three main issues that the appellant is seeking for the determination of this court and the submission read as follows:

> 23.1. Whether the High Court can set aside the whole Arbitration Award when part of the Arbitration Award was 'allowed by mutual consent' of the parties based on the agreed Final Contract Sum less previous payments;
>
> 23.2. Whether there has been a breach of natural justice when the Arbitrator decided that by conduct, the parties have accepted that the Respondent's claim for rectification works is the sum retained as Retention Sum under the Contract; and
>
> 23.3. Whether the Award deals with a dispute not contemplated by or not falling within the terms of the submission to Arbitration when the Arbitrator decided that by conduct, the parties have accepted that the Respondent's claim for rectification works is the sum retained as the Retention Sum under the Contract.

JURISPRUDENCE RELATED TO S 37(3)(6) OF THE UNCITRAL MODEL LAW 1985 ('MODEL LAW') AND NEW YORK CONVENTION 1958 ('CONVENTION') — SETTING ASIDE AWARD IS THE LAST OPTION FOR THE COURT

[8] Malaysia has adopted the Model Law (which has subsumed part of the Convention) for domestic as well as international arbitration. The Convention does not allow an arbitral award to be set aside for error of fact and/or law. The Convention only allows an award to be challenged for one of the grounds set out in article I–V and in particular V. The Convention per se does not make any obligation for the seat court to supervise the arbitral proceedings to ensure that an award issued by the arbitral tribunal is enforceable in the Convention countries unless the relevant exception unique to the state applies.

[9] In essence, the Convention allows an arbitration award made in one Convention country to be enforceable in another country. The Convention supports party autonomy. Parties to an arbitration agreement can even agree to appoint a tribal chief of a remote part of Malaysia as an arbitrator and agree to be bound by his award. That award can be enforceable in any Convention countries. Very crucially when it relates to the Convention and/or strictly the Model Law parties choosing arbitration as a mode of dispute settlement must

take cognisance that they are prohibited from complaining to the court that arbitration award suffers from error of fact and/or law. Party autonomy concept requires the parties to diligently accept the decision of the arbitral tribunal chosen by the parties. Courts as a general rule will be reluctant to interfere whether it is a question of fact or law as the arbitrator is deemed to be the sole and final judge of all questions, both of law and fact, as eloquently stated by Williams J in the 19th Century case of *Hodgkinson v Fernie and Another* (1857) 140 ER 712, where His Lordship also observed:

> You have constituted your own tribunal; you are bound by its decision.

[10] Only in rare circumstances, the courts even under the Malaysian Arbitration Act 1952 (old regime) had interfered in the award and the courts have acknowledged party autonomy concept warrants the court to be slow in interfering with award unless it is immoral, sinful, improper, unconscionable and worthy of condemnation (see *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* [2007] MLJU 893; [2008] 3 CLJ 791 (CA); *Las Vegas Hilton Corporation v Lo Yuk Leung* [1998] HKCU 33).

[11] The greatest setback under the Convention was that it did not provide a commitment for courts in Convention countries to assist and supervise the arbitral tribunal to ensure that arbitral tribunal delivers an award which can be enforced in the Convention country and avoid a challenge under Article V of the Convention. This shortcoming was remedied by countries accepting the Model Law provisions recommended by United Nations Commission on International Trade Law.

[12] Malaysia has adopted the Model Law provisions with some improvements to cater for domestic as well as international arbitration when the seat is in Malaysia. Model Law allows a challenge to the award on similar terms as article V of the Convention in the seat itself. In addition, it obliges the court in lieu of setting aside the award to refer the matter to the arbitral tribunal to correct the award so that the arbitral tribunal will be able to deliver an enforceable award. There are only certain circumstances where the award can be set aside as of right, for example, incapacity of parties, etc. In essence, article 34(4) of the Model Law does not give an option to set aside the award at the first instance unless the exception applies without remitting the matter to the arbitral tribunal. The said article 34(4) read as follows:

> (4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

[13] Malaysia has adopted article 34(4) and is reflected in article 37(6). In

addition, Malaysia has included a sub-provision for the court to separate part of the award, thereby accepting the doctrine of separability and/or severability to set aside a part of the award only and is reflected in s 37(3). The doctrine of severability was already in place by development of case laws under the old regime. If the award can be severed to save the integrity of the decision making process, the courts have readily done so. However, if the award is inextricably interwoven with the jurisdictional issue and cannot be severed without violence to the jurisdictional principles and/or quantum, the courts have refused to exercise its discretion. For example, the Privy Council in the case of *Ram Pratap Chamaria v Durga Prosad Chamaria* AIR 1925 PC 293 on the issue of severability had this to say:

> The principle of severability in cases of awards is very well known. If an award is given in regard to the subject-matter of the suit itself, which is clearly separate and severable from the other matters decided in the award, then there is no reason why the award should not be upheld to the extent that it relates to the subject-matter of the suit ... The court, of course, has no power to deal with matters which lay beyond the ambit of the suit and as such beyond its jurisdiction, but it has certainly power to accept the award in regard to matters in dispute between the parties, which are involved in the litigation itself. If, however, the pronouncement of the arbitrators is such that matters beyond the scope of the suit are inextricably bound up with matters falling within the purview of the litigation, in that case, the court would be unable to give effect to the award because of the difficulty that it cannot determine to what extent the decision of the subject-matter of the litigation has been affected and coloured by the decision of the arbitrators in regard to matters beyond the ambit of the suit. In the latter class of cases, the doctrine of severability cannot operate to save the award even for the purpose of disposing of the pending litigation. (See Malhotra 2006 pages 1131 and 1132).

[14] Severability will be applicable to a complaint, for example, under s 37(1)(a)(v) where the attack is only against part of the award. Section 37(6) closes the door to arguments related to *functus officio*. Very importantly, the AA 2005 permits the court to allow the arbitral tribunal to reconsider the award even though it may have become *functus officio*, and take such steps as in the arbitral tribunal's opinion will eliminate the grounds for setting aside. In *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481, Gopal Sri Ram JCA (as he then was) asserted:

> the jurisdiction to set aside or remit an arbitrator's award whether at common law or under statute is one that should be exercised with great care and a proper sense of responsibility.

[15] Even to remit the award to the arbitral tribunal, the court must be satisfied that award if allowed to be enforced will result in patent injustice, etc (see *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697; [2016] 3 CLJ 403). To set aside an arbitration award, the section clearly requires proof. Mere allegation or surmise will not be sufficient. The burden is

on the applicant. It is also well settled in dealing with an award, the High Court does not enjoy appellate jurisdiction. In *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113; [2007] 3 CLJ 185, Gopal Sri Ram JCA (as he then was) had this to say:

> A court when examining the objections taken to an award made by an arbitrator is not required to examine the correctness of the claim on merits. The court cannot sit in appeal over the views of the arbitrator by re-examining and reassessing the materials.

[16] Even though *Hartela* as well as *Pembinaan* relate to pre-AA 2005 award, it clearly states the court's position that it will not interfere with the award. However, ss 37(3), 37(6) as well as 42(4)(c), etc gives the court some options to consider to save the award being set aside.

[17] The unique position of s 37(6) of the AA 2005 is that when an applicant complains of breach of natural justice and/or dispute not contemplated by the parties as in the instant case, the courts have no option to make a finding on those issues and set aside the award without giving the arbitral tribunal an option to re-open the arbitral proceedings or the award unless the exception applies. Sections 37(6) and also 42(4)(c) to some extent allows the court to check the misconduct of the arbitrator. In essence, ss 37 and 42 permits some supervisory jurisdiction on the arbitrator after the award has been released and if the arbitrator fails to satisfactorily comply with the direction of the court it may lead to committal proceedings.

[18] In *Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd and another appeal* [2017] MLJU 1530, it was stated:

> 22. ... The test for intervention will relate to cases where the award suffers from patent injustice and/or where the award is manifestly unlawful and unconscionable. Usually the consideration which need to be taken into account at the initial stage itself will include whether (i) the point of law attempted to be raised will have substantial effect on the arbitration; (ii) the point have been raised before the arbitrator; (iii) arbitrator's decision must be obviously wrong or the question must be of general public importance and open to serious doubt; (iv) it must be just and proper for the court to determine the question.

[19] In addition, the Court of Appeal asserted that:

> 19(d) Section 36 will fortify the argument that the award is final and binding on the parties. Section 36 provision is not found in the Model Law. Section 36 places a higher threshold on the court when it intends to set aside an award related to a s 37 application. In this respect, the decision from other jurisdiction which does not have a similar provision will not be helpful, save those cases which had dealt with the jurisprudence relating to 'patent injustice' or unconscionability, etc.

A WHETHER THERE WAS MUTUAL CONSENT

[20] Learned counsel for the respondent submits that there was no mutual consent. That part of the submission read as follows:

B
> 25. The Respondent denies that the Appellant's claim was allowed by mutual consent. Although the Respondent did not dispute the amount of RM36,688.39 payable to the Appellant under the Final Certificate, the Respondent did dispute the whole of the Appellant's claim and counterclaimed for LAD and rectification costs.

C **[21]** Mutual consent may be in writing as well as conduct and it all depends on the facts and at times the law. In the instant case, the respondent has two applications at the first instant itself, ie under ss 37 and 42. If the respondent's intention is to set aside the award, the referral on the issue of counterclaim should have been under s 37(6) and not under s 42(3) of the AA 2005.

D Section 37(6) states:

> (6) On an application under subsection (1) the High Court may, where appropriate and so requested by a party, adjourn the proceedings for such period of time as it may determine in order to allow the arbitral tribunal an opportunity to resume the
E arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

[22] Under s 42(3), the scope of courts direction is very limited and is related to the reasons or sufficient reason for the award only. Under s 37(6), the scope
F of courts direction is very wide and it can encompass s 42(3) as an award without any reason or sufficient reasons may be set aside. That is to say, the court can direct the arbitral tribunal to give grounds with a proviso to say if they fail to do so satisfactorily the award may be set aside. The arbitral tribunal on such occasion has two choices: (i) to resume the arbitral proceedings to deal
G with courts direction; or (ii) take any other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

[23] Section 37(6) of the AA 2005 is pari materia to article 34(4) of the UNCITRAL Model Law 1986. The Model Law regime does provide a
H procedure to save the award for breach of natural justice or allegation of related to issues such as 'not within the contemplation of parties' or issues related to pre or post award interest, etc. That is to say, s 37(6) does not give an option to set aside the award as of right at the trial stage or even at the apex stage. The courts must be vigilant of the jurisprudence related to s 37(6) and should not set aside
I the award in the first instance and create miscarriage of justice.

[24] Cases in this area of law have not highlighted in detail the significance of s 37(6); a saving provision for all injustice and/or maladies complained of in relation to an award. In fact with the presence of s 37(6) regime, it will be an

abuse of process of court for any applicant having submitted to an arbitration agreement and in the face of s 36 of the AA 2005, to move the court to set aside the arbitration award. In saying so, there may be instances where s 37(6) may not be applicable. For example, where the grounds relate to incapacity of parties, etc or public policy. In *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor and another appeal* [2017] MLJU 1542, the Court of Appeal observed:

> [6] It is important to note that s 37 is not in pari materia to any of the sections in English Arbitration Act 1996 ('the EAA 1996'). In addition, England is not strictly a Model Law country. England allows the court to intervene on the arbitral award on a number of grounds. There is no provision in England as that of the opening of s 37(1) ie 'An award may be set aside by the Court if …' in relation to setting aside a domestic award. The provisions of ss 67 and 68 of the EAA 1996 give a positive and/or substantive right to the party to challenge the award. At the most the right under s 37, if at all is negative in nature as it is dependent on the courts discretion. Section 37 of the AA 2005 does not give a positive right for the parties to challenge the award. Section 37 of the AA 2005 vests the discretion to the court. The distinction between the English and the Malaysia Act is not one related to an apple and orange but a marble and pumpkin. Counsel, in decided cases often have been instrumental in citing the English cases to seek intervention of the court to interfere in the award. However, most of the Malaysian decisions have not allowed intervention readily and where intervention has been allowed or the jurisprudence advocated has been in favour of intervention the reasoning appears to be convoluted in the light of our s 37 of the AA 2005 and the difference in ss 67 and 68 of the EAA 1996. For ease of reference, we produce ss 67 and 68 of the EAA 1996.

[25] Even our s 42 is not in pari materia to s 69 of the English Arbitration Act 1996 ('the EAA 1996'), when it relates to appeal in respect of point of law. The jurisprudence in England is to accommodate intervention and the jurisprudence in Malaysia for s 42 is to be extremely restrictive in intervention. England also does not have a similar or equivalent provision like s 36 which attempts to bar court intervention per se.

[26] Appreciating the distinction in our ss 37 and 42 of the AA 2005 in relation to the EAA 1996, the Court of Appeal in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697; [2016] 3 CLJ 403, had in simple terms advocated that the test for intervention will be related to one where the award suffer from patent injustice and/or where the award is manifestly unlawful and unconscionable. Parading English judgments in submissions or cases relating to ss 37 or 42 in actual fact have no jurisprudential utility. The test in England can be said to be one related to low threshold to intervene and in Malaysia the legislation has placed a high threshold for intervention, though the threshold to satisfy the grounds stated in s 37 may be low.

[27] In *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor and another appeal* [2017] MLJU 1542, the Court of Appeal made the following observations:

> [9] Section 37 largely subsumes article V of the New York Convention. In addition, it has additional features to ensure the award is not set aside. Section 37 grounds relates to arbitral process. The threshold to satisfy the grounds may appear to be low. However, the court is given discretion not to set aside the award notwithstanding the applicant can establish one or more of the grounds set out in s 37. Some of the grounds stated under s 37, if established, may require the court to set aside the award as of right. For example, incapacity of a party to the arbitration agreement or no notice of the arbitration proceedings was given at all. The weaker grounds will relate to such as 'unable to present the party's case' where due opportunity has been given to the parties and award is within the four corners of the principal contract which carries arbitration clause or agreement (see *Lesotho Highland Development Authority v. Impregilo Spa* [2005] UKHL 43).
>
> [10] In considering whether or not to set aside the award, the court is obliged to look at other provisions of the Act and take a holistic approach as far as practical to sustain the award. Very importantly the court must consider sending the award back to the arbitral tribunal to eliminate the grounds for setting aside. There may be instances where the award cannot be sent back to the tribunal. For example, incapacity of one of the party's to the arbitration agreement or where no notice of arbitration was given, etc.
>
> [11] Unlike the New York Convention regime, the Model Law advocates the jurisprudence to ensure the arbitral tribunal delivers an award which is enforceable. The court's role is to ensure substantive integrity of the arbitral process is maintained at all stages. Trivial complaints framed as excess of jurisdiction related to the manner the arbitral tribunal had handled the issues which arose from the substantive contract having the arbitration clause should not be much of a concern for the court in the regime of party autonomy concept. Only violent breaches on the face of record which compromises the integrity of the decision making process should be the cause of concern for the courts.
>
> [12] It is now well settled that in Malaysia, the arbitrators' award is final, binding and conclusive and can only be challenged in exceptional circumstances. This jurisprudence is unique to Malaysia and is well articulated in s 36 of the AA 2005 which reads as follows:
>
> > 36 An award is final and binding
> >
> > (1) An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court.
> >
> > (2) The arbitral tribunal shall not vary, amend, correct, review, add to or revoke an award which has been made except as specifically provided for in section 35.
>
> [13] In the Malaysian context, s 36 largely closes the door for judicial intervention. Section 36 is not found in the Model Law. In consequence, reliance on other jurisdiction on the scope of intervention will not be helpful. ...

[28] In the instant case, the complaint is related to breach of natural justice and/or dispute not contemplated by parties. In the absence of s 37(6), the court in the past had readily interfered on both the above grounds, etc if the award made by the arbitrator disregards the terms of reference or the arbitration agreement or the contract which would be seen as a jurisdictional error (see *Rajasthan State Mines & Minerals v Eastern Engineering Enterprises* [1999] (9) SCC 283). In the presence of s 37(6), the courts option to set aside the award is limited, more so when the award can be saved by reference under s 37(6). In addition, s 37(1) itself says 'may' and 'only if' and further s 37(1)(a) asserts the applicant must provide proof to rely on the said grounds. Thus, restricting as well as cautioning courts not to interfere with arbitral awards of arbitrators where parties themselves have chosen to be bound by their decisions. The threshold test for intervention by case laws has been set very high. The cases which relates to excess of jurisdiction have very little significance under the Model Law if the award is within the four corners of the principal contract and the test is whether the claimant could raise a particular claim before the arbitrator. Even if the test is satisfied, the option is not to set aside the award without giving an opportunity for the arbitral tribunal to take such action to eliminate the grounds for setting aside.

[29] The scheme of s 37 as well as s 42 is to save the award as far as practical. This scheme is a unique feature of the Model Law. The trial court needs to appreciate the importance of the scheme which is within the framework of party autonomy concept.

[30] Section 37 relates to arbitral process and has nothing to do with arbitral award or the law. Section 42 has nothing to do with arbitral process but it relates to arbitral award and the law. If the arbitrator has not applied the law correctly, the court is obliged under s 42(4)(c) to remit the award in whole or in part with the High Court's determination on the question of law to the tribunal for reconsideration.

[31] The jurisprudence in relation to s 37 as well as s 37(6) was also highlighted in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697; [2016] 3 CLJ 403. A meticulous compliance of the jurisprudence by parties as well as trial courts will save costs and time for the tax payers as well as apex courts to avoid reading lengthy judgments on why the award should or should not be set aside. In essence, under the Model Law regime, the arbitrator is paid to deliver an award which is enforceable and it is not the courts function to set aside the award under s 37 or for that matter, the whole or part of the award under s 42 without giving an opportunity to the arbitral tribunal to deliver an enforceable award. Any parties who make an application under s 37 or s 42 without seeking appropriate direction pursuant to s 37(6), must be seen to be an abuse of process of court and must be dismissed *in limine* unless the

exception applies. In *Petronas* case, the Court of Appeal observed:

> [14] The threshold to satisfy under s 37 is very low (though the courts are slow in setting aside the award) and upon proof if successful, the court has an option to send back the matter to the arbitral tribunal to eliminate the grounds for setting aside, as set out in s 37(6). This was not done in this case. To put it in another way when a party to the arbitration complains of breach related to s 37(1)(a)(iv) and/or (v) etc, he must invite the courts attention to s 37(6) and cannot rely on s 42 as it will be an abuse of process, as he is relying on omission or excess of jurisdiction which is covered under s 37 and not s 42 of the AA 2005.

[32] We do not think that the respondent had made out a case before the learned judge to set aside the award under s 37.

[33] For reasons stated above, we take the view that the appeal must be allowed with costs. The order of the High Court is set aside and the application for the enforcement of the award is allowed.

[34] We will hear the parties on costs and make the necessary orders.

We hereby order so.

Appeal allowed.

Reported by Afiq Mohamad Noor